

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Redesignation of the 17.7-19.7 GHz Frequency)
Band, Blanket Licensing of Satellite Earth) IB Docket No. 98-172
Stations in the 17.7-20.2 GHz and 27.5-30.0) RM-9005
GHz Frequency Bands, and the Allocation of) RM-9118
Additional Spectrum in the 17.3-17.8 GHz and)
24.75-25.25 GHz Frequency Bands for)
Broadcast Satellite-Service Use)

To: The Commission

**REPLY TO OPPOSITIONS FILED AGAINST ICTA'S
EMERGENCY REQUEST FOR IMMEDIATE RELIEF**

The Independent Cable & Telecommunications Association ("ICTA") received four oppositions to its emergency request for immediate relief from the Commission's proposed September 18, 1998 cut-off date for co-primary terrestrial fixed service designations in the 18.3-18.55 GHz band.¹ No opponent rebuts ICTA's showing that the proposed September 18 cut-off (i) is having an immediate and negative impact on private cable operators' plans to build new systems and expand existing systems, (ii) is based on a flawed band redesignation plan, and (iii) is unjustified as a policy matter. Thus, the Commission should lift the proposed September 18 cut-off for co-primary private cable designations in the 18.3-18.55 GHz band.²

¹ Consolidated Opposition of Hughes Communications, Inc. and Hughes Communications Galaxy, Inc. ("Hughes Opposition"); Consolidated Opposition To Request For Relief, filed by GE American Communications, Inc. ("GE Americom Opposition"); Opposition To Emergency Request For Immediate Relief, filed by KaStar Satellite Communications Corp., et al, ("KaStar Opposition"); Lockheed Martin Corporation Consolidated Opposition To Petition For Interim Relief And Emergency Request For Immediate Relief ("Lockheed Martin Opposition").

² ICTA's emergency request for immediate relief is limited in scope. It simply seeks to lift the unnecessary and detrimental September 18 cut-off date proposed for co-primary private cable designations in the 18.3-18.55 GHz band. ICTA takes no position on whether other fixed service users should receive similar relief in other portions of the 18 GHz band.

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List A B C D E

I. OPPONENTS IGNORE THE IMPACT OF THE *NOTICE*'S PROPOSAL TO CUTOFF PRIVATE CABLE'S CO-PRIMARY STATUS AND ALLOW BLANKET LICENSING IN THE 18.3-18.55 GHZ BAND.

Opponents contend that the proposed September 18 cut-off date for co-primary private cable designations in the 18.3-18.55 GHz band is not a freeze on private cable expansion, but rather a balanced approach to licensing the 18 GHz band.³ These contentions reflect gross misconceptions of private cable's spectrum needs and the immediate impact of the proposed September 18 cut-off on the private cable industry.

As ICTA demonstrated in its emergency request, the *Notice*'s proposal to require post-September 18 private cable applicants to protect potentially thousands of ubiquitously deployed satellite earth station receivers in the 18.3-18.55 GHz band is having a chilling effect on private cable's existing and future plans.⁴ The reasons are straightforward. (1) There is no viable method for private cable operators to protect highly interference-sensitive, blanket-licensed satellite earth station receivers. Thus, use of the 18.3-18.55 GHz band by post-September 18 private cable applicants is, for all practical purposes, only on sufferance, that is, until satellite operators deploy their systems. (2) Without access to the contiguous 250 MHz of spectrum between 18.3-18.55 GHz, the remaining pieces of private cable's existing spectrum band are worthless. As ICTA explained in its emergency petition, private cable needs at least 440 MHz of contiguous spectrum to deploy competitive cable services. (3) No other spectrum is currently available for private cable use. And, prospectively, private cable's loss of 440 MHz of spectrum cannot be made up in other segments of the 18 GHz band. Other portions of the 18 GHz band are severely congested, not video-channelized, and lack vendor support.⁵

³ KaStar Opposition, p. 3; Hughes Opposition, p. 5; GE Americom Opposition, p. 5.

⁴ See *Notice*, ¶ 40 (proposing to require secondary private cable licensees that interfere with a blanket-licensed satellite earth station in the 18.3-18.55 GHz band to discontinue operations).

⁵ See ICTA's Immediate Request For Emergency Relief, pp. 5-8. Lockheed Martin is completely wrong in its claim that the *Notice*'s proposal allots sufficient spectrum for private cable expansion.

Realizing that any 18 GHz service they initiate now will almost certainly be forced to go off the air if the *Notice's* proposals are adopted, private cable operators are halting or altering their business plans.⁶ And they are doing so with good reason. Few businesses can afford to expend months of effort and invest tens of thousands of dollars to enter contracts with MDU owners and build private cable facilities only to find that after service begins, it will have to be turned off because it interferes with randomly placed or potentially ubiquitous earth stations. In addition, few businesses will tolerate the risks associated with negotiating contractual commitments with MDU owners and making promises to subscribers when they may have to break them in the future. Faced with the very real prospect that future regulations will take away their continued use of the 18.142-18.580 GHz band, most private cable operators are reluctant to expand existing or deploy new operations.

Opponents argue that September 18 cut-off date does not constitute a *de facto* freeze because it enables the Commission to continue accepting and processing applications for private cable links in their existing spectrum band.⁷ This argument is nonsensical. Even though private cable operators can apply for and obtain licenses in the 18.142-18.580 GHz band after September 18, this does not change the fact that the licenses would be rendered virtually worthless when private cable systems are required to operate on a secondary basis to blanket-licensed satellite users in the 18.3-18.55 GHz band. Confronting the real possibility that the

Lockheed Martin Opposition, p. 7. Because Lockheed Martin provides no support for this statement, and does not refute the detailed showing made by ICTA, its claim should be disregarded.

⁶ Those private cable operators that have invested tens of thousands of dollars and considerable time developing private cable systems must, as a practical matter, move forward with their business plans and the application process even though they may have to satisfy their obligations in the future with severely restricted assets. These private cable operators are not, however, relieved of the risk of losing their sunk costs, credibility with MDU owners, and subscriber loyalty and build-out.

⁷ KaStar Opposition, p. 4; GE Americom Opposition, p. 7.

licenses they may obtain will be of no value in the future, many private cable operators simply have not applied, and will not apply, for systems after September 18.

Opponents also harp on the fact that the *Notice* could have gone further and precluded the accepting and processing of private cable applications in the 18.3-18.55 GHz band after September 18.⁸ That the *Notice* could have been even more restrictive is hardly a response to why the draconian cut-off date is unjustified. Regardless of whether it is ultimately adopted, the threat of a September 18 cut-off on co-primary designations in the heart of private cable's spectrum band is arresting the growth of private cable services and harming competition in the multichannel video distribution marketplace.

II. OPPONENTS' SUPPORT FOR THE PROPOSED SEPTEMBER 18 CUT-OFF IS DISINGENUOUS.

Ignoring the practical impact of the *Notice*'s grandfathering proposal, satellite operators claim that the *Notice* represents a well-reasoned licensing approach that serves the public interest.⁹ Yet these very same parties question the legitimacy of the *Notice*'s band redesignation proposal for the entire 18 GHz band, and specifically seek to alter the *Notice*'s designations for the 18.3-18.55 GHz band. Their support for the *Notice*'s cut-off proposal is, therefore, obviously disingenuous.

Satellite operators recognize the inability of private cable and blanket-licensed GSO/FSS operators to share the 18.3-18.55 GHz band in their comments on the *Notice*.¹⁰ Indeed, because of the impossibility of sharing, opponents urge the Commission to alter the

⁸ Lockheed Martin Opposition, p. 7; Hughes Opposition, p. 10; GE Americom Opposition, p. 4.

⁹ GE Americom Opposition, p. 5; Hughes Opposition, p. 5; Lockheed Martin Opposition, p. 5.

¹⁰ See KaStar Comments, p. 7 ("The KaStar Companies believe that designating 250 MHz for GSO FSS on a primary basis from 18.3-18.55 GHz would be unworkable for both FSS and FS"); Lockheed Martin Comments, p. i ("Lockheed Martin believes that it may not be technically or commercially possible for ubiquitously deployed FSS and terrestrial fixed service systems to successfully share the same spectrum."); GE Americom Comments, p. 7 (recognizing sharing problems in the band).

Notice's proposed redesignation plan for the 18 GHz band.¹¹ For example, KaStar, echoing the concerns expressed by several commenters, specifically questions the appropriateness of designating FSS as primary and private cable as secondary in the 18.3-18.55 GHz band. According to KaStar, "both FS and FSS services would benefit from designating the spectrum from 18.3-18.55 GHz for GSO FSS and FS use on a co-primary basis."¹² Several other satellite commenters, including Lockheed Martin, support gateway FSS and private cable co-primary use of the 18.3-18.55 GHz band.¹³ In light of these comments, oppositions to ICTA's request to lift the cut-off on co-primary private cable designations in the 18.3-18.55 GHz band are illogical and unjust. There simply is no basis for the Commission to retain the proposed September 18 cut-off on co-primary private cable designations when all parties, including satellite interests, question the reasonableness of the band plan upon which the proposed cut-off is based and when the September 18 cut-off proposal is having a real and immediate impact on thousands of private cable and telephony operators, their customers and equipment vendors. The proposed cut-off should be lifted.

III. OPPONENTS' CLAIMS THAT THE CUT-OFF PROPOSAL IS NECESSARY ARE DUBIOUS.

Satellite operators argue that the September 18 cut-off date on co-primary private cable designations in the 18.3-18.55 GHz band is necessary to preserve satellite interests in the

¹¹ Hughes Comments, p. 13 ("While Hughes cannot, at this time, propose an ideal band plan that would accommodate all interested parties, it is clear that a new band plan for the 17.7-19.7 GHz band needs to be considered."); GE Americom Comments, p. i ("The proposed redesignation of the 18 GHz bands requires substantial readjustment."); KaStar Comments, p. 7 (urging the Commission to "modify its plan" and proposing an alternative plan); Lockheed Martin Comments, pp. 2-7 (recommending significant changes to the *Notice's* proposed band segmentation plan).

¹² KaStar Comments, p. 7.

¹³ See e.g., Lockheed Martin Comments, p. 5; Comments of Pegasus Development Corp. pp. 4-5 ("At 18.3-18.55 GHz, where the Commission proposes GSO FSS as the primary service, Pegasus would eliminate the primary allocation to GSO FSS, and create a new primary allocation for FS at 18.3-18.55.").

18 GHz band.¹⁴ However, these parties also concede that they can successfully deploy blanket-licensed operations in the 18 GHz band without having primary status in the 18.3-18.55 GHz band.¹⁵ Thus, it is unclear that blanket-licensed satellite operators even want, much less need, access to the 18.3-18.55 GHz band at all. Until the 18 GHz spectrum allocation issues are resolved, private cable operators should not be subjected to the harms associated with the proposed September 18 cut-off date.

Moreover, even if satellite parties were ultimately designated as primary in the 18.3-18.55 GHz band, the additional spectrum that private cable operators would occupy on a co-primary basis between September 18 and the date of the Commission's final decision in this proceeding would be negligible. ICTA has demonstrated that private cable operators, which file a limited number of applications a year, expend at least six months of time and effort and invest tens of thousands of dollars with respect to each MDU they seek to serve before they file 18 GHz applications.¹⁶ It is unimaginable that the ability to move forward with a reallocation plan in favor of the satellite services would be jeopardized by the marginal additional operations that a lifting of the *de facto* freeze on new private cable applicants would permit. However, those additional operations are critical to the competitive success of the private cable industry.¹⁷

¹⁴ Hughes Opposition, p. 5; GE Americom Opposition, p. 5; Lockheed Martin Opposition, p. 6; KaStar Opposition, p. 4.

¹⁵ KaStar Comments, p. 10; Lockheed Martin Comments, p. 5.

¹⁶ GE Americom contends that ICTA's attachment C, which lists those private cable operators that have undertaken efforts to deploy services using the 18 GHz band, contradicts this fact. However, this attachment lists operators at all stages of the 18 GHz application process. Some have only just begun and others are close to completing the steps necessary to file 18 GHz applications. This does not change the fact that the Commission receives a relatively small number of 18 GHz applications from private cable operators in a given year.

¹⁷ Hughes suggests that a *de facto* freeze is necessary to provide an incentive to private cable operators to work toward an acceptable compromise on the band plan. Hughes Opposition, p. 5. Hughes, however, makes no allegation that ICTA has not worked toward an acceptable compromise. Indeed, ICTA has worked diligently to reach a solution with satellite interests, and has a strong incentive to continue to do so to ensure that the Commission does not go forward with the proposed or any reallocation plan that would cripple private cable development.

IV. COMMISSION PRECEDENT DOES NOT SUPPORT THE PROPOSED SEPTEMBER 18 CUT-OFF.

Opponents' attempts to justify the *Notice's* proposed cut-off on other prior freeze decisions rendered by the Commission do not avail. As ICTA demonstrated in its request for immediate relief, the circumstances present in other proceedings in which the Commission imposed freezes are demonstrably different from private cable's situation.¹⁸

Opponents rely on the Commission's freeze on additional Digital Electronic Message Services ("DEMS") applications in the 18.8-19.3 GHz band, claiming the proceeding presented "many of the issues also presented here."¹⁹ However, in the DEMS proceeding, the Commission froze additional DEMS applications due to the high volume of applications filed *the day after* its decision to redesignate the 18 GHz band.²⁰ As ICTA emphasized in its emergency request petition, the investment of time, money and other resources required to prepare private cable applications for filing precludes private cable operators from filing hundreds of 18 GHz applications in a matter of days after proposed regulatory action. Thus, the DEMS proceeding presents more of a case for differential treatment here than it does for a *de facto* freeze.

The Commission's decisions to impose freezes in the 39 GHz proceeding, in the MDS proceeding and with respect to FM translator stations are similarly inapplicable.²¹ In the 39 GHz proceeding, the Commission instituted the freeze in response to the "increasing number

¹⁸ See ICTA's Emergency Request For Immediate Relief, Attachment C.

¹⁹ Hughes Opposition, p. 6; *see also* Lockheed Martin Opposition, p. 7.

²⁰ See *Freeze on the Filing of Applications for New Licenses, Amendments, and Modifications in the 18.8-19.3 GHz Frequency Band*, 11 FCC Rcd 22363 (1996); *see also* *Amendment to Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz for Fixed Service*, 12 FCC Rcd 3471 (1997) (same proceeding) (noting that 174 applications were filed for DEMS links the day after the Commission rendered its decision).

²¹ See Hughes Opposition, pp. 7-9 (citing *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40 GHz Bands*, 11 FCC Rcd 1156 (1995) & 12 FCC Rcd 2910 (1997); *Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 7 FCC Rcd 3266 (1992); *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 3 FCC Rcd 3664 (1988)).

of applications” (over 2,100 filed from January to November 1995) “that burdened Commission resources.”²² In the case of FM translator applications, the Commission imposed a freeze in light of “the volume of applications for FM translators . . . which could overburden our processing resources.”²³ Likewise, in the MDS proceeding, the Commission determined a freeze was “absolutely imperative because it is the only means by which the deluge of incoming applications, which are being filed at the rate of 1000 per month, can be controlled.”²⁴ As emphasized above, private cable operators must invest substantial time and resources for each MDU they wish to serve. Thus, as a practical matter, they cannot file a large volume of applications in order to preserve spectrum claims. Accordingly, these prior Commission decisions do not support retaining the September 18 cut-off on private cable co-primary designations in the 18.3-18.55 GHz band.

Opponents claim there are “many other cases where the Commission has frozen applications pending the resolution of a significant rulemaking proceeding.”²⁵ Yet, aside from the cases cited above, opponents reference only the Commission’s decisions to freeze modifications in Television Channels 60-69, freeze the TV Table of Allotments in thirty metropolitan areas, and freeze low power applications above a certain channel number.²⁶ None of these decisions, however, threatened the continued growth and viability of a new industry that

²² *Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40 GHz Bands*, 11 FCC Rcd 1156, ¶ 2.

²³ *Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, 3 FCC Rcd 3664, ¶ 62.

²⁴ *Amendment of Parts 1, 2, and 21 of the Commission’s Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 7 FCC Rcd 3266, ¶ 19.

²⁵ Hughes Opposition, p. 7.

²⁶ See Lockheed Martin Opposition, p. 8; Hughes Opposition, p. 7 (citing *Reallocation of Television Channels 60-69, the 746-806 MHz Band*, 12 FCC Rcd 22953, 22970 (1998); *Advanced Television Systems and their Impact on the Existing Television Broadcast Service*, 76 Rad. Reg. 2d (P&F) 843 (1987); *Review of Technical and Operational Requirements: Part 74-E Aural Broadcast*, 2 FCC Rcd 3129 (1987)).

is a vital source of competition to entrenched franchised cable operators.²⁷ Indeed, when faced with circumstances akin to those involved in the present proceeding, the Commission has lifted freeze orders. For example, in the *930 MHz Private Paging* proceeding, once the Commission recognized that the freeze it imposed was “impairing the ability of some PCP operators to develop or expand their systems based on plans formulated prior to the adoption of the Notice,” it lifted its previously-imposed freeze.²⁸

Recognizing that the Commission should lift a freeze “when the negative impact of the freeze outweighs its benefits,” Hughes argues that “in this case, the benefits of the Commission’s licensing approach clearly outweigh its negative impacts.”²⁹ However, Hughes has made no showing to this effect. In contrast, ICTA has demonstrated that the negative impacts are disastrous for private cable and that the benefits for satellite operators are negligible. In addition, Hughes recognizes that the “Commission’s tentative band segmentation proposal has several serious shortcomings.”³⁰ Because Hughes and the other satellite opponents consider the *Notice*’s band redesignation proposal to be flawed, their hollow statements concerning the benefits of the *Notice*’s proposal should be disregarded.

V. SATELLITE OPPONENTS FOCUS SOLELY ON THEIR INTERESTS, NOT THE PUBLIC INTEREST.

Satellite opponents would like the Commission to regard this proceeding with only a concern as to how their interests can be served. According to Hughes, “by definition, this proceeding is about how ubiquitous satellite earth stations can be licensed in the 18 GHz band.”³¹

²⁷ In addition, with respect to channels 60-69, the Commission decided to freeze modification requests to increase service areas of TV channels 60-69 “as of six months after the release date of the Report and Order.” This is vastly different from the proposed September 18 cut-off in this proceeding.

²⁸ See *Amendment of the Commission’s Rules To Provide Channel Exclusivity To Qualified Private Paging Systems at 929-930 MHz*, 8 FCC Rcd 2460 (1993).

²⁹ Hughes Opposition, p. 9.

³⁰ Hughes Comments, p. 13.


³¹ Hughes Opposition, p. 10.

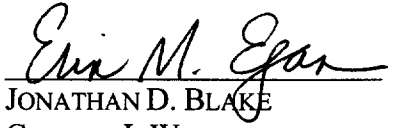
However, this proceeding is not only about how satellite stations can be licensed in the 18 GHz band, but how that interest is to be coordinated and accommodated with the legitimate and valuable services rendered to the public by private cable operators.

The future success of private cable systems as a competitive force in the telecommunications and MVPD markets depends upon their continued ability to construct, operate and upgrade advanced microwave networks using the entire 18.142-18.580 GHz band. Because the Commission's September 18 cut-off proposal for co-primary private cable designations in the 18.3-18.55 GHz band threatens to disrupt private cable's use of the entire 18.142-18.580 GHz band, and there is no feasible provision for an alternative home, it places the future of the private cable industry in jeopardy. This uncertain future is negatively impacting the entire industry today. Satellite opponents have not provided any justification for disrupting and delaying the provision of private cable services to subscribers throughout the United States. Accordingly, the September 18 cut-off date for co-primary private cable designations in the 18.3-18.55 GHz band should be lifted immediately.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply to Oppositions Filed Against ICTA's Emergency Request For Immediate Relief was sent this 21st day of December, 1998, by first-class mail, postage prepaid or hand delivered where denoted by an asterisk, to the following persons:

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